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Rights of Nursing Public Employees

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❖ **Introduction**

More than a decade ago, a Yale Journal of Law and Feminism author wrote:

“Medical professionals have found that breastfeeding has substantial benefits for both children and mothers. Children who have been breastfed have a reduced risk of bacterial infection, botulism, diarrhea, respiratory illness, viral infection, allergies, and sudden infant death syndrome – to name a few.

“In addition to the decreased risk of developing certain ailments, children who have been breastfed also enjoy improved vision, cognitive functioning, educational achievement, and speech development.

“Mothers benefit from breastfeeding as well: Those who breastfeed have reduced risks of breast cancer, ovarian cancer, gestational diabetes, and after-birth bleeding. Breastfeeding has also been found to aid mothers in losing excess maternal body fat and in returning to their pre-pregnancy shape.”^[1]

It was a long and difficult struggle to enact a federal law allowing working women to express milk their infants. Legislative efforts at the state level are still unfinished.

❖ Federal law

The [Patient Protection and Affordable Care Act of 2010](#) ^[2] (“*Obamacare*”) amended the [Fair Labor Standards Act](#), 29 U.S. Code § 207, as follows:

1. An employer shall provide —
 - (A) a reasonable break time for an employee to express breast milk for her nursing child for 1 year after the child’s birth each time such employee has need to express the milk; and
 - (B) a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk.
2. An employer shall not be required to compensate an employee receiving reasonable break time under paragraph (1) for any work time spent for such purpose.
3. An employer that employs less than 50 employees shall not be subject to the requirements of this subsection, if such requirements would impose an undue hardship by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer’s business.
4. Nothing in this subsection shall preempt a State law that provides greater protections to employees than the protections provided for under this subsection.

Until that law was passed, nursing mothers lacked any federal protection. Attempts to litigate rights for breastfeeding workers were unsuccessful. For example, in [McNeill v. N.Y.C. Dept. of Correction](#),^[3] the court found that an infant’s medical condition did not fall with the definition of “pregnancy, childbirth, or related medical condition” and was not protected under Title VII. The court also concluded that the *Pregnancy Discrimination Act* was designed to protect a mother’s disability due to pregnancy or childbirth, and not child care.

The U.S. Dept. of Labor published a [fact sheet](#) pertaining to the 2010 law. It cautions that employees who are exempt from overtime provisions are not protected by the amendment, but may have rights under state laws.

The Office of Personnel Management recently has issued [guidance](#) for nursing mothers in federal employment.

❖ State laws

As of 2010, twenty-four states provided statutory protection for women in the workplace who wish to express breast milk. A [list of state laws](#) is maintained by the National Conference of State Legislatures. State statutes supplement women's rights under federal law.

For example, New York's law^[4] is applicable to all public and private employers, regardless of the size or nature of their business. The state has issued [Guidelines Regarding the Rights of Nursing Mothers to Express Breast Milk in the Work Place](#). Mothers that want to express milk must be given unpaid breaks of 20 minutes (or in some cases 30 minutes). New York employers are not responsible for insuring the safekeeping of expressed milk stored in any refrigerator on its premises.

A break must be offered to a New York employee at least once every three hours, and unpaid break time may run concurrently with regularly-scheduled paid break or meal periods. An employer must allow the employee to work before or after her normal shift to make up the amount of time used during the unpaid break time(s) for the expression of breast milk so long as such additional time requested falls within the employer's normal work hours.

In Colorado, public and private employers must make reasonable efforts to provide a room or other location in close proximity to the work area, *other than a toilet stall*, where an employee can express breast milk in privacy. Before an employee can resort to litigation, the parties must resort to nonbinding mediation.^[6] If an employee is covered under both Colorado and federal laws, the employer must follow the law which provides the greater protection to its employees.

❖ Implementation of federal and state laws

AELE staff counsel recommends that:^[6]

1. Each state, city, county and special district should publish an omni-department policy that conforms to federal law, and any applicable state statutes or local ordinances.
2. Each department within a state, municipal or county government should establish its own procedures to implement employee rights. For example, New York City's [Personnel Bulletin 440-13](#) sets forth eight items under the procedures section. These may be supplemented, but not limited, by individual city departments.

3. An implementation directive should specify the mechanism to resolve complaints before a lawsuit is filed. For example, a university police officer brought a federal civil rights suit alleging that her supervisor would interrupt her during personal break times, during which she expressed milk for her baby. ^[7] A simple grievance might have resolved that complaint.
4. Unions have a role in finalizing an agency's express milk procedures. A directive that affects the terms and conditions of employment is mandatory item of collective bargaining. Nonfederal public employees bargain in all but a few states; see [list](#).
5. Federal law protects working mothers for only twelve months following birth. State laws might extend that time or simply do not limit the duration. ^[8] In the absence of a state law, agencies should seek pediatric advice, rather than be governed by the federal minimum.
6. Federal law does not specify the maximum length of an express milk break, how often these breaks may be taken, or the number of unpaid breaks that may be taken during a workday. Each agency should limit these periods consistent with business necessity.
7. An OPM [memorandum](#) cautions that if a federal agency allows a morning and an afternoon paid break, mothers may express milk during those periods while on the clock. The same rule should be adopted by nonfederal agencies.
8. Employers should permit lactating employees to have their own portable cold storage receptacle or device in the workplace. In some jurisdictions, employers are encouraged to provide a refrigerator or cold storage device, but are not required to do so if they allow workers to bring their own. ^[9] See, [Pumping and Storing Breastmilk](#), Calif. Dept. of Public Health (2009).



9. The lactation area must not be inside a women's toilet room or stall. It should have a three-prong grounded electrical outlet and be near a sink that is suitable for hand washing. See, Oregon State Police, [Workplace Breast Feeding Support](#) (2000).
10. Agencies/departments should prohibit discriminatory treatment of participating working

mothers and retaliation against any employee who reports violations of law, policy or procedures to a superior or to a designated public official or agency.

11. Employers have been sued by lactating workers who objected to work station relocations. A breastfeeding federal worker challenged the loss of her private office in [White v. Schafer](#), #08-cv-01874, 2010 U.S. Dist. Lexis 92731, 110 FEP Cases (BNA) 541 (D. Colo.). Agency policy can address in this concern.

❖ **Notes:**

1. 12 Yale J. L. & Feminism 263, 265 (2000).
2. 29 U.S. Code § 207(r)(1)-(4) (2010).
3. 950 F. Supp. 564 (S.D.N.Y. 1996).
4. N.Y. Labor Law § 206-c (2007).
5. Colo. Rev. Stat. § 8-13.5-101 (2008).
6. Opinions expressed by Journal authors are sent to the publication's article [review panel](#) but do not necessarily reflect AELE corporate policy.
7. The action was brought under the *Pregnancy Discrimination Act*; a stronger case could be made under current law. [Page v. Univ. of Penna.](#), #06-1008, 222 Fed. Appx. 144, 2007 U.S. App. Lexis 6738 (3rd Cir.).
8. [Oregon](#) is 18 months, O.R.S. § 653.077(7); [New York](#) is 36 months, Labor Law § 206-c.
9. See, for example, Indiana Code 22-2-14-2 (2008) (“*To the extent reasonably possible, an employer shall: (1) provide a refrigerator or other cold storage space for keeping milk that has been expressed; or (2) allow the employee to provide the employee's own portable cold storage device for keeping milk that has been expressed until the end of the employee's work day.*”).

❖ **References:** (*Chronological*)

1. Rulemaking Note, [Reasonable Break Time for Nursing Mothers](#), U.S. Dept. of Labor, 75 (244) Fed. Reg. 80073 (12/21/2010).
2. Article, [Respecting Working Mothers with Infant Children](#): The Need for Increased Federal Intervention to Develop, Protect, and Support a Breastfeeding Culture in the United States, Heather M. Kolinsky, 17 Duke J. Gender L. & Pol’y 333 (May 2010).

3. Report, [Summary of State Breastfeeding Laws](#), Congressional Research Service, Doc. No. 7-5700 (2009).
4. Article, The Lactating Angel or Activist? Public Breastfeeding as Symbolic Speech, Elizabeth Hildebrand Matherne, 15 Mich. J. Gender & L. 121 (2008).
5. Book, Breastfeeding Rights in the United States (Reproductive Rights and Policy), Karen Kedrowski and Michael Lipscomb, Praeger, ISBN 978-0-275-99136-4 (2008).
6. Article, [Creating a Breastfeeding Friendly Workplace](#), Ontario Public Health Assn. (2008).
7. Article, [Breastfeeding in the Workplace: Accommodating Women and Benefiting Employers](#), Melissa Martin, 58 (1) J. of Marriage and the Family (Wiley) 239 (2007).
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12. Article, A Step Toward True Equality in the Workplace: Requiring Employer Accommodation for Breastfeeding Women, Lara M. Gardner, 17 Wis. Women's L.J. 259 (Fall, 2002).
13. Article, [Breastfeeding in the American Workplace](#), Shana M. Christrup, 9 (3) Am. U.J. Gender Soc. Pol'y & L. 471 (2001).
14. Law Note, Reclaiming Title VII and the PDA: Prohibiting Workplace Discrimination Against Breastfeeding Women, Diana Kasdan, 76 N.Y.U.L. Rev. 309 (April, 2001).
15. Article, Litigating a Breastfeeding and Employment Case in the New Millennium, Henry Wyatt Christrup, 12 Yale J. L. & Feminism 263 (2000).
16. Article, Accommodating Pregnancy and Breastfeeding in the Workplace: Beyond the Civil Rights Paradigm, Jendi B. Reiter, 9 Tex. J. Women & L. 1 (1999).

17. Article, Protecting Public Breast-Feeding in Theory But Not in Practice, Dumeriss Cruver-Smith, 19 Women's Rts. L. Rep. 167 (1998).
 18. Article, Lactation and the Labor Market: Breastfeeding, Labor Market Changes, and Public Policy in the United States, J. Galtry, 18 Health Care Women Intern. 467 (1997).
 19. Article, Maternal-Infant Separation and Breast-Feeding: The Return to Work or School, Irene Frederick & Kathleen Auerbach, 30 J. Reprod. Med. 523 (1985). (*"infants find it difficult to switch from one form of feeding to another, resulting in nipple confusion."*)
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